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IN THE

Supreme Court of the United States

October Term 1957, No. 147
Formerly October Term 1956, No. 1040

COMMISSIONER OF INTERNAL REVENUE,
Plaintiff and Respondent,

vs.

WILSHIRE HOLDING CORPORATION,
Defendant and Petitioner.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Murray M. Chotiner, on behalf of petitioner, Wilshire Holding Corporation, prays that a rehearing be granted, that petitioner's petition for a Writ of Certiorari issue to remand the action to the United States Court of Appeals for the Ninth Circuit, or to the Tax Court of the United States, to determine what portion of the payments under the contract in issue shall be charged to capital as the purchase price of the real property in question, and what portion shall be charged to a deductible expense as rent or interest.

Statement of Case.

The Tax Court of the United States in the consolidated cases of *Walburga Oesterreich v. Commissioner of Internal Revenue* and *Wilshire Holding Corporation v. Commissioner of Internal Revenue*, Docket Nos. 32946

and 32954, rendered a decision against Walburga Oesterreich and in favor of Wilshire Holding Corporation on March 9, 1953, based on a Memorandum Findings of Fact [Oesterreich, Tr. of Rec. pp. 172-180]. The opinion is reported in 12 Tax Court Memorandum 277, and in effect holds that the contract involved is a lease of real property and not a contract of sale.

The United States Court of Appeals for the Ninth Circuit on the petition of *Walburga Oesterreich v. Commissioner of Internal Revenue*, No. 13924, reversed the decision of the Tax Court on October 29, 1955. The opinion is reported in 226 F. 2d 798, Ninth C. C. A.

The United States Court of Appeals for the Ninth Circuit granted the motion of the Commissioner of Internal Revenue summarily to reverse the decision of the Tax Court in the case of *Commissioner of Internal Revenue v. Wilshire Holding Corporation*, No. 14100, on December 6, 1956 [Tr. of Rec. Doc. 21-22].

The Petition for Rehearing and Rehearing En Banc were denied by the United States Court of Appeals on April 15, 1957 [Tr. of Rec. Doc. 23].

A Petition for Writ of Certiorari to the Supreme Court of the United States was duly filed, and denied on October 14, 1957.

Question Presented.

Where title to real property appraised at from $50,000 to $75,000 passes after the payment in excess of $679,000, what portion of the payments shall be charged to capital as the purchase price of the real property, and what portion shall be charged to a deductible expense as rent or interest?

ARGUMENT.

Points and Authorities.

[Unless otherwise stated, reference to pages is to the Oesterreich Transcript of Record—Stip. refers to Stipulation; Par. refers to Paragraph; Dep. refers to Deposition of W. Frank Moulton, and Ex. refers to Exhibit.]

The United States Circuit Court of Appeals, in reversing the Tax Court of the United States, stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity." [Appendix B, Pet. for Writ of Cert. p. 17.] However, the Court did not determine or remand the case to the Tax Court to determine what part of each payment is going toward the acquisition of the land.

The Circuit Court held that Ten Dollars was a token consideration for title at the end of 68 years.

It is beyond all reason to hold that more than $679,000 is being paid for real property appraised at $50,000 to $75,000, which was the appraised value of the land when the contract was executed in 1929 [p. 74; Dep. pp. 18, 46].

The rental payments for the 68-year term of the contract will aggregate in excess of $679,000, which is approximately 10 to 14 times the value of the property [pp. 74, 166; Dep., pp. 18, 46; Ex. p. 1].

The result of the Court's decision is highly artificial, because it is obvious that even if there really was "a sale" that a substantial part of each annual payment is attributable as interest. The denial of any deduction to the lessee-"purchaser" for these payments is grossly unfair. It should be noted in this connection that it now seems to be administrative policy in lease-purchase

cases to recognize an interest deduction to the lessee-purchaser.

The two lots purchased and used for the construction of the theatre building and which were conveyed to Oesterreich in 1929 cost the predecessor in interest of Wilshire $19,650 [Stip. par. 4, p. 34]. The three lots owned by Oesterreich cost her $24,235.05 [pp. 32-33].

The findings of the Tax Court are that the three lots were worth not more than $50,000 in 1929, and not more than $100,000 in 1946, the date of the hearing [p. 178]. These findings are supported by the testimony of W. Frank Moulton, the real estate agent, that the property was worth $50,000 [Dep. pp. 18, 46], and by the testimony of Albert Jack Chotiner that it was worth between $50,000 and $75,000 [p. 166].

The present lessee, together with its predecessor in interest, has paid approximately $162,000 from the inception of the contract in September 1929, to the end of 1946 [Ex. 1], for property appraised at from $50,000 to $75,000 at the time of the execution of the contract. The excess cannot be part of the purchase price but must be construed as rent or interest; the same should apply to the balance of the $679,000 required to be paid under the contract. In any event, this case requires a determination of what the interest would be on a deferred payment plan over 68 years for property being "purchased" and which was appraised as being worth from $50,000 to $75,000.

This Honorable Supreme Court has not settled an apparent conflict in the decisions of two different Circuit Courts.

In a recent case, *Breece Veneer and Panel Company v. Commissioner of Internal Revenue*, 232 F. 2d 319, de-

cided April 26, 1956 (subsequent to the decision in the *Oesterreich* case), the United States Court of Appeals for the Seventh Circuit ruled that payments made under a "lease and option to purchase" agreement constituted deductible rental expense.

In the *Breece Veneer and Panel Company* case the taxpayer entered into a "lease and option to purchase" agreement with the R. F. C. in 1943 with respect to certain property. Taxpayer was to pay $100,000 in 60 monthly installments as "rent", after which it had the option to purchase the property for $50,000. The taxpayer claimed the monthly payments as deductible rental expense under Section 23(a)(1)(A), 1939 Code, but the Tax Court disallowed the claimed deductions on the ground that the taxpayer was acquiring, through the monthly payments, an equity in the property, and the evidence indicated the R. F. C. would not have sold the property for $50,000, or any comparable amount. The property in question had a fair market value at the time of the agreement of $376,500 and was insured for $325,000. The evidence also showed that the R. F. C. was primarily interested in selling the property and for reasons of its own was willing to sell for a price of $150,000 to $185,000.

The Court of Appeals reversed. The taxpayer was neither bound to pay rent substantially equal to the value of the property to obtain a deed, nor was it sure to become the owner.

The R. F. C. was attempting to protect itself in the transaction by a lease. In case of default in rent it would be easier to regain possession from a tenant than to foreclose or forfeit a contract to purchase and dispossess the purchaser. The taxpayer could exercise the option or

not, but in the meantime the payments were neither to be applied on the purchase price, nor were the monthly payments to be made by the taxpayer more than the reasonable rental value.

In short, the Seventh Circuit ruled that the payments under the contract constituted deductible rental expense, whereas the Ninth Circuit held to the contrary.

A rehearing should be granted, as intervening circumstances of a substantial or controlling effect have occurred in that the Supreme Court apparently did not pass on the portion of the opinion of the Circuit Court of Appeals for the Ninth Circuit wherein the Circuit Court stated, "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity." Furthermore, the question of remanding the case to the Circuit Court or to the Tax Court to determine what portion of the payments should be charged to capital and what portion to a deductible expense has not been previously presented.

Wherefore, it is respectfully urged that the Petition for Rehearing should be granted so the case may be remanded to the Circuit Court of Appeals or to the Tax Court of the United States for the reasons stated.

Respectfully submitted,

MURRAY M. CHOTINER,
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Petitioner, Wilshire Holding Corporation.

Certificate of Counsel.

Murray M. Chotiner does hereby certify:

1. That he is one of counsel for the petitioner;

2. That the Petition for Rehearing is presented in good faith and not for delay; and

3. That the petition is restricted to the grounds herein above stated.

MURRAY M. CHOTINER.